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South Plainfield, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

SAFETY KLEEN SYSTEMS, INC.

and

Case Nos. 22-CA-26970
22-RC-12532

LOCAL 641, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Tara Levy, Esq., Newark, NJ, for the General Counsel
Julius M. Steiner, Esq. and *Jason E. Reisman, Esq*.,
(Obermayer Rebmann Maxwell & Hippel LLP), Philadelphia, PA,
for the Respondent

DECISION

Statement of the Case

MINDY E. LANDOW, Administrative Law Judge. Based upon a charge filed on June 27, 2005,[1] and an amended charge filed on August 25, in Case No. 22-CA-26970, by Local 641, International Brotherhood of Teamsters (Union), a complaint and notice of hearing issued on October 31 against Safety Kleen Systems, Inc. (Respondent).

The complaint alleges essentially that on or about June 27, and at times thereafter, Respondent has refused to employ Joseph Davis, and that on or about August 17, Respondent suspended Jeffery Speed, in violation of Section 8(a)(1) and (3) of the Act. Respondent filed an answer denying the material allegations of the complaint.

On October 15, 2004, the Union filed a petition in Case No. 22-RC-12532, seeking an election in a unit comprised of:

> All full time and regular-part time customer service representatives, branch secretaries, material handlers, demo drivers/customer service representatives, customer service technicians and market sales representatives employed by the Employer at its South Plainfield, New Jersey facility, but excluding all other employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

An election was held on November 23, 2004. On November 29, 2004, the Petitioner timely filed objections to the election.[2] A Hearing Officer's Report on Objections, affirmed by a Decision and Direction of Second Election issued by the Board on May 18, sustained a single objection where it was found that Customer Service Manager David Meyer threatened

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[1] All dates are in 2005 unless otherwise indicated.

[2] The tally of ballots showed eight votes for and eleven votes against the Petitioner, with three challenged ballots.

employees with plant closure if the Petitioner were to prevail in the election. Thereafter, a second election was held among the unit on June 28.[3] On July 5, the Petitioner timely filed objections to conduct affecting the results of this election, and on November 4, the Regional Director issued a Report on Challenged Ballots and Objections and Order Consolidating Cases and Notice of Hearing which consolidated for hearing the instant unfair labor practice case and the objections case.[4] The sole objection to be resolved herein concerns the discharge of Joseph Davis. On January 11, 12 and 18 a hearing was held before me in Newark, New Jersey.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsel for the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a corporation, with an office and place of business located in South Plainfield, New Jersey, the sole facility involved herein, is engaged in the sale and provision of environmental services. During the 12 month period preceding the issuance of the complaint, Respondent purchased and received at its South Plainfield facility, goods and services in excess of $50,000 directly from suppliers located outside the State of New Jersey. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization Status

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. Alledged Unfair Labor Practices

Facts

Union Activities of Davis and Speed

The Union activities of both Davis and Speed were open and notorious during the organizational campaign and subsequent proceedings and are largely uncontested. Davis initially contacted the Union, and served as an election observer in the first election. Both men distributed union cards to their fellow employees and were vocal participants during meetings held by management, where they challenged various assertions made by, and on behalf of, management during the organizational campaign. Former Market Sales Specialist Randy Brown[5] testified that Davis and Speed were considered to be the leaders of the Union

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[3] The tally of ballots showed seven votes for and eight votes against the Petitioner, with five challenged ballots, including one cast by Davis, a number determinative of the outcome of the election.

[4] The eligibility status of four of the five challenged voters was resolved and their ballots subsequently opened and counted. On November 17, a revised Tally of Ballots issued showing seven ballots for and twelve ballots against representation. Thus, the sole remaining challenged ballot (that of alleged discriminatee Joseph Davis) is not determinative of the outcome of the election.

[5] Brown, who testified pursuant to subpoena, testified on behalf of the Employer at the first objections hearing. While being cross-examined by the Union's attorney, Brown admitted that he heard the threat of

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organizing drive. Both Davis and Speed testified in the objections hearing which led to the Decision and Direction of Second Election.

The Discharge of Joseph Davis

Davis' Employment History

Davis began working at Respondent in January 2001, holding a variety of positions including automotive service representative, branch sales specialist and senior customer service representative (senior CSR). In the latter position, Davis was responsible for training customer service representatives (CSR's) and dealing with client problems. In about March 2003, Davis transferred to a CSR position due to his desire to increase his salary with the potential to earn commission income. In this position, he was primarily involved in the servicing of customer equipment and transportation of hazardous and non-hazardous waste materials from customer sites. He occupied this position at the time of his discharge.[6] During all relevant times, Davis had a Class C Commercial Drivers License (CDL) with HAZMAT and tanker endorsements. He testified, without contradiction, that he would have been eligible to receive a Class B CDL upon successful completion of a road test.

Davis' Medical Leave and Respondent's Leave Policies

In January 2005, a physician's visit revealed that Davis was suffering from high blood pressure among other ailments and, pursuant to his physician's recommendation, Davis began a leave of absence from his job as of January 26. Respondent placed Davis on leave under the Family Medical Leave Act (FMLA), which requires certain employers to provide their employees with up to 12 weeks of unpaid leave to attend to a serious health condition of the employee or a member of his or her family. Respondent's employee handbook provides that, upon return from FMLA leave, "most employees may be restored to their original or an equivalent position."[7]

Respondent also maintains a policy which permits an employee to be eligible for a personal leave of absence without pay. According to the written personnel policy, such leave is granted for an initial period not to exceed 30 days. Extensions are possible, upon written application. The relevant policy provisions further state:

> Due to the nature of the Company's business, Safety-Kleen cannot guarantee that either your job or a comparable position will be available when you return from a leave of absence. However, Safety-Kleen will make every reasonable effort to reinstate you to your former position or to one with similar responsibilities.

On May 10, Respondent's Benefit Manager Nicky Ellison sent Davis a letter advising him that his leave under the FMLA had expired on April 19, and that his application for short term disability had been rejected due to the determination that "you are not actively at work due to employee/employer relations rather than illness or injury." The letter further states:

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plant closure made by Meyer.

[6] There are varying classifications of CSR's depending primarily upon which type of vehicle is driven. These include CSR, oil driver/CSR and vacuum ("vac")/CSR. Respondent additionally refers to this position as "Sales and Service Representative."

[7] Davis' applications for worker's compensation and short-term disability leave were rejected by those respective agencies.

As a result of the foregoing and the lack of any additional information from you or your healthcare provider, you do not appear to qualify for leave under any of Safety-Kleen's policies. Ordinarily, your employment would be terminated under these circumstances.

It is our understanding, however, that on or about April 28, 2005, you called the South Plainfield facility and informed the Branch Manager of your possible intent to work on May 16, 2005. In accordance with Safety-Kleen procedure, before returning to work it will be necessary for you to provide a medical certification of your ability to return to work without restriction. Accordingly we request that within three (3) days of your receipt of this letter, you provide appropriate medical certification of your release to return to work without restriction on May 16, 2005.

The record does not contain Davis' response to this letter; however it is acknowledged that he had several possible return dates. In addition to the May 16 date noted above, the record establishes that Davis supplied a certification from his treating psychologist, dated April 13, but apparently sent by facsimile transmission on May 18, attesting to the fact that he was still under treatment for depressive disorder, but would be able to return to work as of June 6. A subsequent evaluation, dated June 9, was later sent establishing Davis' estimated recovery date as June 27.

The "D-Day" Comment

Former Market Sales Manager Brown testified that at some point in time, after Davis had been expected to return to work but had failed to do so, he was party to a conversation with Meyer and Facility Branch Manager William Herman[8] where Herman referred to the fact that Davis was scheduled to return to work, and referred to the date of his anticipated return as "D-Day." Herman further stated that Davis' return would instigate union activity and get everyone riled up. Herman testified that his comment regarding "D-Day" was meant to be a historical reference to June 6th, the date of the 1944 Normandy invasion, and stated, "I mean, if he was coming back on Halloween, I would have said it's Halloween." Herman did not refute Brown's testimony, however, that he made specific reference to Davis' union activities during this conversation. Respondent did not call Meyer as a witness.[9]

Davis is Discharged

On June 27, Davis arrived at the South Plainfield facility. He was asked to leave and return in one hour. Upon his return, Davis met with Herman and John Demopoulos, who has the title of Senior Human Resources Director for the North Region. Davis was asked whether he was physically ready to return to work, and replied in the affirmative. At that point, Demopoulos advised Davis that there was no available position for him, and his employment was being terminated. Davis collected his things and left the facility.

Davis subsequently contacted Demopoulos and requested a letter of termination. After his request was refused he called the Safety Kleen Human Resources Department, located in Plano, Texas. The following day, Davis was contacted by Giovanni Notobartolo, who is the

[8] Herman is the highest ranking on site manager. All employees and other site managers report to him.

[9] Brown testified that at the time this conversation took place it was his understanding that there was a job opening for Davis, and Herman acknowledged that there was, in fact, an available position for Davis at this time.

Regional and Truck Director for the North Region, and reports to Demopoulos. Notobartolo told Davis that he was separated from employment with the company due to the lack of an available position, and had not been terminated for cause. Davis disputed Notobartolo's assertion that there was no position available for him, stating that it was his understanding that there were three available positions he could fill: senior CSR, customer service associate (CSA) and oil driver/CSR. According to Davis, Notobartolo told him that the company was unsure whether the senior CSR job would be filled and that offers of employment had been extended with respect to the other two positions, but that training for these employees had not yet started.

Notobartolo testified that he told Davis that his employment had been terminated since he had exhausted his medical leave and that offers had been extended with respect to any open positions. He advised Davis that an offer for the CSA position had been extended to Kirk Banks and that he was not qualified for the oil driver/CSR position as he did not have a Class B license. Notobartolo testified did not recall any discussion of the senior CSR position on this occasion.

Positions Available at Respondent's Facility on June 27

Branch Manager Herman testified that had Davis returned to work on June 6, there would have been a position available for him, and he would have been reinstated. On June 27, however, there was no available position for which he was qualified. Herman testified that although an oil driver/CSR position was open at this time, Davis was not qualified for the position due to the fact that he did not have a Class B CDL. The CSA position, as a trainee position, paid significantly less than what a CSR would earn, and Davis was overqualified in any event. Additionally, an offer of employment had already been extended to Banks. Herman stated that he "believed" that this offer had been accepted prior to June 27, but he was not certain.

Demopoulos testified that there was no senior CSR position available at the time Davis sought to return to work. In May, John Zuckowitz, who at the time was the senior CSR, was promoted to Customer Service Manager. According to Demopoulos, a decision was made at the time not to fill the position that he vacated, as it was not revenue generating. Demopoulos testified that Herman requested that he be allowed to fill the position at a meeting which was held for the New York and New England regions in July. I note, however, that Herman was not questioned regarding this matter, and offered no testimony regarding why he could not fill the senior CSR position in June, or when he was finally authorized to do so. The only testimony Herman gave on this issue was in response to a question from Counsel for the General Counsel, where he testified that he filled the senior CSR position in October, when CSR Greg Troy was promoted.

Respondent's Leave Policies as Applied to Other Employees

Demopoulos testified that Davis was treated consistently with its established personnel policy and that it has treated other employees in a similar manner. In support of this contention, Respondent presented evidence regarding two employees who had worked at other facilities. John Giacomuzzi, employed in a facility located in Massachusetts, was out on leave from September 15, 2004 through January 31, 2005. According to Demopoulos, after Giacomuzzi exhausted his 12 weeks of job-protected leave, the company hired another employee for his position and when Giacomuzzi returned from leave, he was terminated.[10] Similarly, an

[10] The employment record introduced into evidence by Respondent does not contain this

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employee named Eric Langlois, employed at a facility located in Indiana, was out during the period from February 1, 2005 through March 3, 2005. Demopoulos testified that his position was filled while he was out on leave, and he terminated upon his return. Demopoulos offered no explanation of why Langlois was replaced within 12 weeks, and it appears from his testimony that he had no personal knowledge of the circumstances relating to this employee. The records in evidence fail to indicate what kind of leave either one of these employees was on at the time of their discharge.[11]

In addition, Counsel for the General Counsel relies upon evidence relating to Nicholas Borzolko, who was employed at South Plainfield as a Market Sales Specialist. He went out on an extended leave due to personal circumstances beginning January 12 and remained out until October 24. Demopoulos testified that in about July, he became aware of the situation, and recommended to Herman that some action had to be taken as Borzolko had not indicated that he was returning to work. Approximately one month earlier, in June, Brozolko had been listed on the Excelsior list supplied by Respondent for the NLRB election held on June 28. Speed testified, without contradiction, that Borzolko voted in the election, and it appears from the record that his ballot was not challenged. According to Demopoulos, Borzolko was terminated pursuant to Respondent's policy of automatically terminating an employee who is on leave or inactive status for seven months or longer. There is no explanation, however, of why his termination was not effectuated until October.

Most of the record evidence regarding other leaves of absence taken by employees, based upon documents introduced into evidence by Counsel for the General Counsel, relates to situations lasting less than 12 weeks, and shows that employees were reinstated at the conclusion of their respective leaves.

The February Incident Report and Davis' Subsequent Attempt to Return to Work

The complaint additionally alleges that since June 27, Respondent has continued to refuse to employ Davis. Respondent does not dispute that to be the case, and argues that its failure to offer Davis work stemmed from an incident report he filed with the South Plainfield police, and Herman's personal discomfort with the idea of working with him.

On January 19, Davis noticed that the safety lever of the cab of his truck was disengaged. He had been driving with the truck in this condition for the entire day, and became concerned for his safety. He also felt that the condition might have been intentionally caused. Davis reported the problem to Herman, who replied that another employee had been driving the truck. Davis felt that Herman was unresponsive to his concerns. Davis then discussed the situation with Meyer and Zukowitz, who agreed that the situation could have posed danger to him. Herman testified that he investigated the incident by checking the safety record for the truck and informed Davis that he should be checking for the engagement of his safety lever as part of his daily pre-trip inspection. He additionally stated that, even if the lever was disengaged,

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information. There is a section on the form entitled "Termination Reason" with instructions to check either one of two options: discharge or failure to return from leave. Neither option is checked. In another section, this record does indicate, however, that Giacomuzzi was considered ineligible for rehire.

[11] In its brief, Respondent contends that Langlois was not guaranteed a job at the end of his leave even though it was less than 12 weeks because it was "non-FMLA" leave. According to Respondent, at the time his leave commenced, Langlois was not eligible for FMLA leave because he was not employed by Respondent for the legally required minimum time period of one year. These assertions, however, are not supported by probative evidence adduced at the hearing and I do not accord them any weight.

any danger to the driver was mitigated by the existence of a secondary safety feature.

On February 14, Davis filed a "Criminal Mischief" complaint with the South Plainfield Police Department. He named himself as the "victim" and Herman and Meyer as "involved parties." The section of the report listing "offenders" was blank. The narrative portion of the report states:

> J. Davis responded to police headquarters to report that on January 19, 2005 someone tampered with his work vehicle intentionally.
>
> Davis stated that there is an ongoing problem at his place of employment between him and management. Davis is attempting to organize the workers to unionize and he feels that the management is retaliating against him to prevent it.
>
> On January 19 Davis noticed that the safety lever of the cab of his work truck was disengaged and the safety pin was pulled. Davis stated that if he were to stop short for any reason it could have caused an accident. Davis does not know who disengaged the safety lever but he feels that management was involved.

According to Davis, the police told him that due to the amount of time that had elapsed since the incident, there was little they could do, but that they would notify the company that a report had been filed in the event there were any further incidents.

After his termination, Davis wrote to Safety Kleen seeking employment. A letter, dated October 2, addressed to Herman and also sent to Respondent's Human Resources office states in pertinent part:

> I am writing this letter to you to express my interest in employment with Safety Kleen Systems, Inc. I am fully capable of performing the duties and functions of any position available within the branch at South Plainfield.

Herman testified that at the time he first learned of the incident report, Davis was still a Safety Kleen employee out on leave, so his personal reaction was not an issue. Subsequent to Davis' termination, he did not rehire Davis due to his discomfort with the incident report. Herman was asked whether he had ever expressed this discomfort to anyone at any time, and gave varying answers. Initially, Herman testified, "I believe I expressed it by not responding to his resume and his letter. I think that was pretty clear." When asked again if he had ever told anyone about the reason Davis was not hired, Herman replied, "Mr. Davis didn't ask and I don't really remember if anybody else did." Herman then testified that he told "anybody that asked, numerous people." Herman specifically named Zukowitz, Demopoulos and Safety Kleen counsel.

Demopoulos testified that he first learned about the incident report in February, and that Herman was upset by it and wanted to get a lawyer and see if he could take legal action. According to Demopoulos, Herman expressed concern about working with Davis: "He said the – the guy thinks I'm trying to kill him and how – how is that going to – how am I going to be able to deal with this guy? I mean I'm always going to be looking over my shoulder." Demopoulos told Herman that, while he understood how he felt, Davis would be reinstated if returned to work within his 12 weeks [of FMLA leave]. Demopoulos also spoke with Herman on a subsequent occasion, after Davis had been scheduled to return to work but had extended his leave, and on at least one occasion told Herman that if Davis was to return and there was an open position for which he was qualified, Davis would be put to work in that position.

Respondent's Subsequent Hiring of Employees

Herman testified that after Davis was discharged, the next CSR was hired, "probably sometime in July." Personnel records entered into evidence show that John Hudson commenced work on July 11, however there is no specific evidence regarding when he was offered, or accepted, the position.[12] When questioned by Counsel for the General Counsel, Herman's testimony on this issue was as follows:

Q: But was he hired before July 11?

A: What's your definition of hired?

Q: Did you make an agreement that he would start working there prior to July 11, the day that he reported for work?

A: Most likely, I didn't offer him a job that morning. I don't know the hire date.

Q: But you don't know when?

JUDGE: You have to answer her question.

A: Oh, I'm sorry. Yeah, that's right, I don't know when we offered him a job.

Q: Did you interview him?

A: Yes.

Q: Did you make the decision to hire him?

A: Yes.

Between August and December, five CSR's were hired by Respondent. There is no specific evidence as to when these individuals were offered, or accepted employment. Herman testified that, at the time of the hearing, there was an open CSR position at Respondent's facility.

In late August, Respondent advertised for a "Route Sales and Service" representative. Shortly before Davis wrote to Respondent seeking employment, it had placed a classified advertisement seeking an "Oil Sales and Service" representative. These positions are the equivalent of the CSR and oil driver/CSR positions at Respondent's facility. The advertisements are discussed in further detail below.

Respondent's License Requirement

As noted above, Respondent has contended that Davis was not qualified for an oil driver/CSR position which concededly was available on June 27 due to the lack of a Class B CDL. Herman testified that since April or May 2005 he has been requiring such licensure for

[12] It appears from the record that Hudson was hired as an oil driver/CSR.

CSR positions and that he will not hire anyone who does not have one.

On May 4, Herman issued a memorandum to all South Plainfield CSR's advising that it was now mandatory that all employees have their Class B license, air brakes, tanker and HAZMAT endorsements on their licenses. Employees were informed that by July 31, 2005 everyone must have taken the written tests and have a road test scheduled. A subsequent memorandum, summarizing the contents of a September 13 weekly meeting reiterates: "Every CSR must have AT A MINIMUM a class B permit w/tanker, air brakes and haz mat AND his road test scheduled for a CLASS B CDL with AIR BRAKES, TANKER AND HAZMAT BY FRIDAY WEEK FOUR, P 10 (Three weeks from this Friday – 10-7-2005.) This is a job requirement – if you do not do this, do not plan on coming to work the following week."

As of the time of the hearing not all of Respondent's CSR's had obtained a Class B license and no employee had been terminated for a failure to obtain one. In October 2005, CSR's were advised that they could attend driving school if they required assistance with obtaining Class B licenses. General Counsel adduced evidence that at the time of his promotion to senior CSR, Troy did not have a Class B license and that Herman had accompanied Troy on one unsuccessful attempt to pass his road test in late November or early December. According to Herman, however, this license is not required for the senior CSR position.

As noted above, Respondent placed classified advertisements for certain vacant positions. One, which ran on August 28, seeks a "Route Sales and Service Representative." The qualifications sought by the Respondent are:

> A high school diploma or GED, 2-3 years route based sales/service experience, the ability to lift 50+ pounds and general knowledge of environmental, health and safety compliance are required. Excellent communication skills and attention to detail are necessary; and a class B commercial driver's license with tanker endorsement/HAZMAT (or the ability to obtain one) is required.

Similarly, the advertisement placed on September 25 seeking an "Oil Sales and Service Representative" seeks candidates with "a high school diploma or GED, 2-3 years of route-based sales/service experience, general knowledge of environmental, health and safety compliance and a Class B CDL with tanker endorsement/HAZMAT (or the ability to obtain one)." Herman testified that this position is the equivalent of the oil driver/CSR position which was available on June 27.

The Suspension of Jeffery Speed

Speed's Prior Employment with Safety Kleen

Beginning in 2001, and continuing until sometime in 2002, Speed worked for Respondent using the name Hassan Allen, which is not his legal name. Speed provided Respondent with a false social security number, and eventually acknowledged that he used this false social security number to apply for a driver's license. Respondent relies upon this conduct in challenging Speed's credibility.[13]

In about March 2003, Speed received a phone call from Branch Manager Keith Lewis

[13] Apparently, Davis and Speed are involved in litigation with Safety Kleen and Speed's deposition in that matter was used to impeach his testimony.

(Herman's predecessor), who had hired him initially as Allen, inviting him to return to work. Lewis told Speed that when he reported to training, he should act as if all the information was new to him. Speed was initially employed in the warehouse, and became a CSR shortly thereafter.

Events Leading Up to Speed's Suspension

On Wednesday, August 10, Speed was informed by Zuckowitz that a coworker named E.J. Gregory[14] had a large drum pickup, and needed to use his truck. Speed was instructed to clean the truck, and removed everything except a spill kit (consisting of absorbents, gloves and rags for cleanup in case of a spill) and an empty trash container. Speed then helped Gregory load the truck with drums to service Gregory's customer. Gregory made the pickup and returned the drums, filled with waste, to Respondent's facility, where they were removed. Gregory's paperwork showed that he had picked up 23 drums, but only 22 were accounted for at the facility. At some point, this discrepancy was discovered but it is not clear from the record exactly when.

On Thursday, August 11, Speed resumed driving his truck. Zuckowitz stated that his truck was empty and he should not to put anything on it because he had a big pickup to do. Speed did a visual inspection of the outside of the truck, but did not open the truck to check the rear.[15] He then left for his assignment, which was to pick up 24 empty containers from the Federal Courthouse in Newark. Just before Speed arrived at his stop, he received a phone call from Facility Manager Tim Franzetti who asked him to check the back of his truck to see if he was carrying a 55 gallon drum, because there had been a mistake on Gregory's bill of lading from the prior day. Speed checked the truck and told Franzetti that there was no 55 gallon drum on the truck. At that time, or shortly thereafter, Speed did notice an open 30 gallon drum. Speed did not report its presence. Speed testified that he looked in the drum and saw absorbents, typically used to clean spills and that these absorbents appeared dry. At the time, he did not see any spill. On cross-examination, Speed initially testified that he called Gregory to ask about the open drum. When asked why he had called Gregory, Speed stated that Gregory had called him to ask for driving directions, and he happened to mention the open drum during one of several telephone conversations the two had on that day. Gregory told Speed that a customer had asked him to remove the drum, which had previously been left on the customer's property. According to Speed's pre-hearing affidavit, when he returned to the facility that afternoon, he asked Gregory about the open drum and Gregory told him that he would take care of it. Speed acknowledges that he did not report the presence of the drum to anyone and that he did not take steps to seal or label it. When Speed returned to the facility that day, his truck was reconciled by the material handler, and nothing was said about the open drum. Speed asserted that if he had thought that that there were any problems with the drum, he would have reported it.

The following day, Friday, Speed took his truck out again. When he inspected the truck that morning, he saw that the open drum was still there. According to Speed, someone inspected his truck that morning, and issued a bill of lading, but he could not state who that was. Speed testified that he did not do anything about the drum at this time, again because he thought that nothing was remiss. He left the facility and at the second stop developed gear

[14] Gregory, who is no longer employed by Respondent, did not testify.

[15] Speed drives a box truck. Initially, Speed testified that a pre-trip inspection did not include checking the inside of the truck, but later conceded that he did perform such an inspection every day, but had not done it on this day based upon the fact that Zuckowitz had told him the truck was empty.

trouble. He called Herman, who, along with Zuckowitz, came with a replacement truck. Speed loaded his containers into the replacement truck and exchanged trucks with Herman, leaving the open drum in the back of his truck. He used the replacement truck for the remainder of that day.

Speed did not work on Saturday or Sunday. On Monday, Franzetti escorted Speed to his truck, and showed him a spill. Speed stated that he did not know anything about it and that when he had last used the truck, there had been no spill. Herman called Speed in and asked him if anything had happened with his truck during the prior week. Speed initially stated that he did not know what Herman was talking about, and began walking away. He then mentioned the open drum and said that Herman would have to discuss that with Gregory. Herman told Speed that he could not drive his truck that day.

On Tuesday, August 16, Speed met with Respondent's Environmental Health and Safety Manager, Marwan Fanek, who asked him about his role in the incident. According to Speed, he asked Fanek if he was going to be suspended, and Fanek told him that the only mistake he made was that he should have checked his truck, but not to worry and that he had done nothing wrong. Fanek denied making this statement and his account of their discussion, at odds with Speed's in several material respects, is discussed below.

Speed was suspended indefinitely, pending investigation, on Tuesday. Franzetti walked him to his vehicle after the suspension. Speed admitted telling Franzetti that he "fucked up" and that he should have inspected the truck before he took it on the road. He additionally acknowledged that he made a similar admission to Fanek. Franzetti reported Speed's comments to Fanek, who asked him to put them in writing.

Respondent's Investigation

Fanek is responsible for overseeing regulatory requirements for a number of Respondent's facilities, including those located in New Jersey. He additionally conducts training for employees in environmental and safety regulations and requirements and investigates environmental and safety incidents. According to Fanek, there are basic requirements that all drivers transporting used oil and other hazardous materials must adhere to. These include performing truck inspections prior to and after use to make sure that the vehicle is mechanically road-worthy, ensuring that there are appropriate shipping papers for material that is carried on the truck and securing the load to make sure that containers do not tip or roll over. When picking up waste, drivers are required to make certain the waste is properly labeled and sealed. CSR's and other drivers are trained in the regulatory requirements for their positions in an initial week-long program which takes place in Baltimore and receive ongoing instruction at their home branches.

On Sunday, August 14, Fanek received a voice mail message from Herman advising him that during the course of a truck inventory he and Franzetti had discovered a stain in the back of one of the trucks, where they also found an open and unlabeled 30 gallon container with saturated oil pads. Fanek was asked to investigate the incident. He arrived at the facility on Tuesday, discussed the matter with Herman and conducted separate interviews with both Gregory and Speed. According to Fanek, he told Speed that there appeared to be a spill in the back of the truck with a container of unknown content with no label, which raised concerns with his department. As a result of his interviews with Gregory and Speed, Fanek determined that on Thursday, as Speed was using his truck, he received a call from Franzetti asking whether he had a container of used oil on the truck because they had identified a discrepancy in the load from the previous day. Speed replied that he did not have an extra drum of waste. When Speed

arrived at the customer's location, however, he noticed a container of saturated oil rags or pads.[16] At about 11:00 AM, Speed called Gregory to ask him about this container, and Gregory replied that he would take care of it at the end of the day when he returned from the road. Gregory then could not get to the truck because he had to leave early due a commitment to pick his daughter up from school. The container remained open and unlabeled on Speed's truck on Thursday and Friday. On Friday, Speed took the truck to perform his normal service and called the branch to report of a problem with the vehicle. Herman arrived with another vehicle to move the drums from Speed's truck so that the materials could be brought back to the branch. Speed staged all of the drums on the tailgate of his truck with the back door closed, and when the second truck arrived, the material was moved.

Fanek's interview with Gregory led him to conclude that Gregory picked up a drum of oil-saturated pads from Otis Elevator on Wednesday, August 10. Gregory admitted leaving this material on the truck, and he confirmed having a conversation with Speed on Thursday morning during which he promised to take care of the drum on Thursday afternoon.

Fanek additionally inspected the truck and saw the spill and a container with oil saturated pads.

Fanek testified that he counseled Speed as to the deficiencies in his job performance, and Speed admitted that once he had identified a problem container on his truck, he should have called the supervisor rather than Gregory. Fanek reached the conclusion that Speed erred by not reporting the questionable container to management and by transporting the material without appropriate documentation on both Thursday and Friday. He recommended that both Speed and Gregory be discharged. Instead, both employees were suspended pending further investigation.

Herman's Comments Regarding Speed's Suspension and Union Activities

Five days into his suspension, Speed was at the offices of the National Labor Relations Board, where he saw Randy Brown. Brown told him of a conversation that he had with Herman and stated that that Safety Kleen wanted to get rid of him. At the hearing, Brown testified that this conversation took place at a gathering with other co-workers at a local restaurant to celebrate Brown's last day of work. Herman came to this gathering, and mentioned to Brown, in the immediate vicinity of two other employees, that Speed had been involved in a situation involving a spill and that, because of the incident, the company would be able to terminate him. Brown replied that "that sucked," and Herman responded to the contrary: that it was a good thing because Jeff was a "yes" vote and it would work out better.

Speed's Suspension is Lifted

After Speed spoke with Brown, he called Respondent's corporate office and spoke with counsel. Shortly afterward, Herman called Speed and asked him to come in the following morning. When he arrived, Herman was not present. He returned to the facility the following morning and met with Herman and Regional and Truck Director Notobartolo. According to Speed, he was told the investigation was still pending, but that he could return to work the following day. At the time, Speed was given a notice of suspension, dated August 25, for

[16] Fanek was specifically asked whether Speed admitted that he found used absorbent pads on his vehicle. Fanek replied, "He did identify there's a problem container, yes, on the truck. And, therefore, he called E.J. to inquire about the container."

substandard work, carelessness, falsification of records, improper conduct and policy violation alleging dates of misconduct on 8/11 and 8/12. The narrative portion of the suspension notice states:

> On 8/25/05 [sic] Jeff Speed discovered undocumented waste on his truck. Upon doing so, he failed to notify anyone in management in order to determine appropriate corrective action. Instead he called EJ.
>
> Jeff failed to label the waste and transported it all day, in violation of DOT/EPA regulations.
>
> Jeff failed to properly reconcile the waste at the end of the day and left it unlabelled on the truck.
>
> The following day, Jeff AGAIN transported the undocumented waste, and AGAIN failed to report to the incident to management. At some point there was a spill, and that was never reported to upper management.
>
> The waste remained on the truck until it was discovered there by management on Sunday morning.
>
> These actions, and your failure to take appropriate action, put the company, the public and your fellow employees at risk. It is essential that we follow our environmental compliance policies. Be informed through this notification that
>
> 1. Your suspension will be unpaid in keeping with our disciplinary policy
>
> 2. ANY FURTHER DEVIATIONS FROM OR VIOLATIONS OF COMPANY POLICY WILL LEAD TO THE TERMINATION OF YOUR EMPLOYMENT.

IV. Analysis and Conclusions

Applicable Legal Standards

Under the standard set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 393 (1983), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the General Counsel bears the burden of proof, by establishing through a preponderance of the evidence, the elements of protected activity, employer knowledge of that activity, adverse employer action and animus against employees' exercise of protected activity. If the General Counsel is successful, the burden of persuasion then shifts to the employer to show, again by a preponderance of the evidence, that it would have taken the same action even in the absence of the protected activity. *Wright Line*, supra; *Transportation Management*, supra.

The Board and the courts have long recognized that direct evidence of anti-union motivation may not be available to the General Counsel. The General Counsel may, then, attempt to meet is burden by reliance upon circumstantial evidence and the record as a whole from which it may be inferred that protected activity motivated the employer's adverse action. *Flour Daniel, Inc*. 304 NLRB 970 (1991). Such circumstantial evidence, however, must be substantial and create more that a suspicion that union activity was behind the employer's decision. *Ronin Shipbuilding Inc*., 330 NLRB 464 (2000). An employer does not satisfy its burden by merely stating or demonstrating a legitimate reason for the action taken, but instead

must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co*., 316 NLRB 771 (1995). However, an employer's defense does not fail simply because not all the evidence supports it, or some evidence tends to refute it. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992). Ultimately, the General Counsel has the burden of proving discrimination. *Wright Line*, supra, 251 NLRB at 1088, n.11.

In the instant case, I find, based upon the weight of the credible evidence, and bearing in mind the relative burdens of proof attributable to the parties, that Counsel for the General Counsel has met her burden of establishing that the discharge of Joseph Davis was violative of the Act, but has failed to do so with regard to the suspension of Jeffery Speed. With respect to the representation case, notwithstanding my determination that Respondent violated the Act by discharging Davis, I find that under the particular circumstances of this case, a new election is not warranted herein.

Respondent's June 27th Discharge of Davis

Davis' Union activity, along with Respondent's knowledge of this activity, is well-established by the record and fundamentally undisputed. There is some historical evidence that Respondent has had animus toward the Union's attempts to organize employees, in particular as reflected in Meyer's threat that the facility would be closed should the Union prevail in the initial election. In addition, the General Counsel has shown some direct, contemporaneous evidence of animus as reflected in Brown's unrebutted testimony regarding Herman's "D-Day" comments which specifically address the fact that Davis' return would instigate Union activity at Respondent's facility. I also infer union animus generally based upon Herman's subsequent comments to Brown regarding the possibility of terminating Speed as a good thing as he was a "yes" vote. Moreover, for the reasons set forth herein, I find that Respondent's proffered defenses to its failure to reinstate Davis are pretextual in nature, and infer animus from that, as well.

Thus, I find that Counsel for the General Counsel has met her initial burden under *Wright-Line*, supra, of establishing that Respondent's failure to employ Davis' was, at least in part, motivated by unlawful considerations. Accordingly, the burden now shifts to the Respondent, to show by a preponderance of the evidence, that it would not have employed Davis, even in the absence of any Union activity.

Respondent argues that its refusal to return Davis to work on June 27 resulted from a neutral application of its personnel policies and the lack of any available position for which he was qualified. Contrary to Respondent's assertions, I find that the Respondent has failed to meet its burden of proof in establishing by a preponderance of the evidence that, on June 27, there were no available positions for which Davis was qualified.

Herman acknowledged that on June 27, when Davis returned to work, there was an open oil driver/CSR position. It was admitted that this is the equivalent of the position described in the classified advertisement placed on September 25. Respondent asserts that Davis was unqualified for this position due to a lack of a Class B CDL. No other deficiency was identified by Respondent regarding Davis' qualifications for the position, and Herman specifically acknowledged that Davis otherwise met the requirements for this position. The advertisement which ran on September 25 requires *either* a Class B license, *or* the ability to obtain one. Respondent has failed to establish that Davis could not meet this latter qualification, as he had only to pass a road test to obtain the requisite license, just like many of the other drivers that were then employed by Respondent. I find that Respondent has failed to prove its contention

that Davis was not qualified for the available oil driver/SCR position available on June 27 as the record shows that he possessed the very same requirements which were advertised to and sought from the general public some three months later. Moreover, in treating Davis less favorably than any other potential applicant for the position, Respondent demonstrates unlawful considerations in its refusal to offer him employment at this time.

Even if I were to conclude that Davis did not meet the qualifications for the oil driver/CSR position, I would still find that there other positions available for Davis as of June 27. In its brief, Respondent states: "When Davis returned to work on June 27, 2005, Safety-Kleen had no vacant CSR positions available. Safety-Kleen had replaced Davis after his FMLA leave ended." As noted above, Herman admitted that on June 6 there was an available position for Davis. As I have found that the General Counsel has established that there is a prima facie case that Davis' protected activity was a motivating factor in Respondent's failure to return him to work, the burden is on the Respondent to demonstrate that, between the dates of June 6 and June 27, something occurred to render this position unavailable. Respondent has failed to meet this burden.

Herman testified that, after Davis was discharged, the next time he hired a CSR was "probably sometime in July." Respondent clearly had ample opportunity to adduce through Herman, or any other management representative, information as to when and how the position which had been available to Davis on June 6 became unavailable, and it failed to do so. Even assuming that Hudson was Davis' purported replacement, which is not clear from the record, no specific testimony was adduced as to when Hudson was offered or accepted employment.[17] Moreover, Respondent failed to explain why detailed proof on this issue could not be adduced. The only conclusion that can be drawn from this record is that there was, at the very least, one available position open to Davis between the dates of June 6th and the time Hudson commenced work on July 11. In addition, I find that the Respondent's failure to offer unambiguous, probative evidence on this issue supports an adverse inference that if such evidence had been presented, it would not have been favorable to the Respondent. *GATX Logistics*, 323 NLRB 328, 331 fn. 9 (1997); *Asarco, Inc*., 316 NLRB 636, 640 (1995).

Further, I find that Respondent has failed to meet its burden of showing that the senior CSR position was unavailable at the time Davis sought to return to work. As noted above, the position became available when Zuckowitz was promoted in May. Davis had previously worked in this position, and Herman testified that it did not require a Class B license. Demopoulos offered testimony that this position was unavailable at the time; however, as noted above, Respondent cannot merely state this to be the case, but bears the burden of persuasion on the issue. *T&J Trucking Co.*, supra. Demopoulos failed to offer specific testimony as to who made the decision not to replace Zuckowitz. Moreover, his testimony on this issue was uncorroborated by Herman, and I find this failure of corroboration to be particularly significant insofar as Demopoulos testified that it was Herman who later requested that the position be filled. This lack of corroboration raises an inference that additional testimony would be adverse to the Respondent. See *International Automatic Machine*, 285 NLRB 1122 (1987), enfd.861 F.2d 720 (6th Cir. 1988).

Based upon the foregoing, I conclude that Respondent has not carried its burden of proof in establishing, by a preponderance of the evidence, that its failure to return Davis to work

[17] In general, I found Herman's testimony to be evasive and argumentative. His testimony on this particular issue was no exception, and the relevant portions have been outlined above.

on June 27 was due to the lack of any available position for which he was qualified.[18]

The Suspension of Jeffery Speed

Again, I find that the General Counsel has established a prima facie case regarding Speed's suspension. Speed's Union activities are undisputed. There is unrebutted proof that Herman harbored residual animus toward Speed based upon his Union activity, as evinced by Brown's testimony that Herman expressed pleasure in anticipating that the oil spill could result in Speed's termination, which would be a good thing since he was a "yes" vote.

Counsel for the General Counsel argues that Respondent's proffered reasons for

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[18] Inasmuch as I have concluded that Respondent violated the Act by not reinstating Davis on June 27, it is not necessary for me to consider whether Respondent violated the Act by refusing to subsequently employ him. However, I am mindful that this issue may be raised before the Board, so I will discuss my findings and conclusions. Respondent asserts that its continuing refusal to employ Davis stemmed from the fact that, by filing the incident report which named Herman as an involved party, Davis "irrevocably damaged his business relationship" with his employer.

In deciding the issue of the alleged continuing refusal to employ Davis, I find that the matter should be evaluated under the standard set forth by the Board in so-called refusal to hire cases. Under *FES,* 331 NLRB 9, 12 (2000), the Board utilizes the *Wright Line* approach to analyze refusal to hire cases, but adds some additional requirements to General Counsel's prima facie case. These are that the employer is hiring at the time of the discrimination, and that the applicant has the relevant experience or training for the position. Here there is no dispute that Respondent was hiring in and after October 2005 and, as discussed above, I have concluded that Davis had the relevant experience or training for the positions that were open at that time. I additionally find that animus towards Davis' protected conduct contributed to Respondent's decision not to hire him. Thus, the only issue is to be decided is whether Respondent has shown that it would not have hired Davis, for other reasons, even in the absence of his protected conduct.

I find that this presents a closer issue than Respondent's discharge of Davis on June 27 because I credit Herman insofar as he testified that the allegations contained in the incident report caused him to have reservations about whether he wanted to work with Davis in the future. I find, however, that Respondent has ultimately failed to meet its burden to prove that it would not have hired Davis at this time irregardless of his Union activities.

First of all, since Davis filed the incident report in February, the distinction between Respondent's proffered reasons for not employing Davis on June 27 and its failure to do so thereafter is largely an artificial one, in my view. Further, there was little substantive evidence offered on this issue. Respondent offered unconvincing evidence that Herman ever advised anyone in the company that he would not hire or would prefer that Respondent not hire Davis because of the police complaint. Herman's testimony was inconsistent and I did not find Demopoulos' testimony regarding his conversation with Herman to be probative. Demopoulos did not strike me as having a true memory of this discussion. Moreover, I find the words attributed to Herman to be inconsistent with the demeanor he exhibited throughout the trial. In particular, I do not find it plausible that Herman would have spoken in terms of how *Davis* would feel and his consequent worries about dealing with him in those circumstances. In addition, while Demopoulos testified that Herman was so offended by Davis' allegations that he wanted to sue him, Herman made no mention that this had ever been considered or discussed with anyone. I find Herman's failure to corroborate Demopoulos in this regard to be significant. While it may well be the case that the incident report was a factor prompting Herman to ignore Davis' letter, Respondent has failed to show that it was the predominant factor or that any other neutral business justification existed at the time.

I further note that while Herman is the highest ranking site manager, Respondent has various levels of centralized control over personnel matters. In this regard, I find it significant that there is also no evidence that Respondent made an official determination that Davis would not be rehired because he had filed a police incident report which named Herman. Based upon the foregoing, I find that Respondent has failed to meet its burden of proof to show that it would not have hired Davis notwithstanding his Union activity.

suspending Speed are pretextual in that there is no evidence incriminating Speed in transporting waste or causing a spill, other than what Speed acknowledged in the investigation, and that his conduct was unconnected to any spill. General Counsel argues Speed should be credited as it is unlikely that he would drive around for two days carrying hazardous material without documentation, at a time when his relationship with his employer was strained not only due to Union activity, but because of a private lawsuit. Counsel for the General Counsel additionally argues that it would be unlikely that Speed would allow two managers to take over operation of his truck if had it contained waste.

Counsel for the General Counsel further argues that the investigation conducted by Fanek was inadequate and result-oriented as it sought to pin the blame for the incident on Speed, but ignored the obvious culpabilities of the individuals who failed to reconcile the loads carried on the truck and also negates any role in the incident which may have been played by Herman, who was apparently the last to drive the truck prior to the spill being discovered. General Counsel argues that the investigation itself constitutes evidence of disparate treatment toward Speed as it was the only one in which Fanek had been asked to write a detailed written report.

I agree with the General Counsel that there are certain aspects of Respondent's investigation of this incident which, on this record, appear to be incomplete. Nevertheless, as discussed below, I have concluded that Respondent has shown that it would have suspended Speed for his misconduct notwithstanding his Union activities.

I credit Fanek's testimony regarding his interviews with both Speed and Gregory, which was presented in a thorough and considered manner. During this interview, Speed acknowledged that he transported waste without appropriate documentation, and that he should have informed management about the situation. He admitted that his actions were contrary to the law and company policy. Moreover, the account of events as adduced by Fanek provides a cohesive explanation of what occurred. In contrast, Speed's testimony at the hearing was inconsistent in certain significant respects. For example, Speed initially testified that when he discovered the drum he called Gregory. When asked why he called Gregory if nothing was remiss, Speed testified that Gregory called him for directions and the subject of the open drum just came up. Both accounts are inconsistent with Speed's pre-trial affidavit in which he stated that he spoke about the drum with Gregory on Thursday afternoon at the facility. In another inconsistency, while Speed initially disputed that his job responsibilities included a pre-trip inspection of the truck's interior, he later acknowledged that he was expected to perform such an inspection. Further, it is undisputed that Speed acknowledged to Franzetti that he "fucked up" insofar as he did not inspect his truck [on Thursday morning] before he took it on the road. The obvious implication of this admission is, of course, that had he done so, he would have discovered the open drum, and avoided the difficulties which ensued. Such a comment further suggests that Speed knew that the contents of the drum were problematic. This conclusion is further buttressed by the fact that Speed did not simply unload the drum on Thursday evening and did not transfer it when he exchanged trucks with Herman on Friday. General Counsel argues that this behavior suggests that Speed believed there was nothing wrong with the contents of the drum. I conclude, to the contrary, that it indicates that Speed was trying to conceal the unexplained and unreported drum until it could be dealt with.

On the particular issue of whether Speed told Fanek that he knew there was waste in the drum, I fail to see why Fanek would have been untruthful on this point. Inasmuch as a spill was identified on the truck, and waste seen in the drum, any denial by Speed would have more likely been viewed as further evidence of his culpability in that he sought to cover up his role in the incident. Thus, even if I were to assume, as the General Counsel suggests, that the

investigation was result-oriented, there would have been nothing to gain by falsifying what Speed said to Fanek about the condition of the absorbents on the truck.

Based upon his investigation, Fanek determined that Gregory had picked up and transported a drum of waste without appropriate documentation, failed to report it to management and did not seal or label the waste. Speed, for his part, failed to inspect his truck the morning after Gregory had used it, carried the waste, unsealed and unlabeled, on his truck for two days without documentation and failed to report the situation to management. According to Fanek, these actions subjected the drivers to potential fines, forfeiture of their commercial licenses and possible arrest. Thus, he recommended termination of both employees. It appears that Fanek failed to consider Herman's possible role in the course of events leading to the oil spill, or whatever discrepancies there may have been in the load reconciliations on Wednesday and Thursday evening. However, I find it significant that in attributing responsibility to Speed, Fanek relied upon the unlawful transporting of waste and concurrent failure to inform management of the situation. It was this conduct which led to his recommendation of discipline: contrary to General Counsel's suggestion, he did not attempt to pin blame for the entire episode on Speed.

In sum, I find that Respondent could reasonably rely upon the results of Fanek's investigation, as well as Speed's admission to Franzetti in making the decision to discipline him. Based upon the foregoing, I conclude that Respondent has met its burden of proof in showing that it would have suspended Speed irregardless of any concerted activity on his part, and I shall recommend that this complaint allegation be dismissed.

The Representation Case

As set forth above, I have concluded that Davis was discharged in violation of Section 8(a)(1) and (3) of the Act. The evidence is clear that Davis was a primary architect of the organization drive, and was viewed as such by other employees. Under the unique circumstances of this case, however, I conclude that the sole objection to the election in Case No. 22-RC-12532 should be overruled and that a Certification of Results be issued.

Dal-Tex Optical Co., 137 NLRB 1782 (1962), provides for the nullification of a representation election conducted amid contemporaneous unfair labor practices. The premise of this rule is that unfair labor practices committed during the "critical period" prior to an election is "a fortiori conduct which interferes with the exercise of a free and untrammeled choice in an election." Id. at 1786-1787. The Board historically has recognized an exception to the *Dal-Tex* rule in that some unfair labor practices, although violative of the Act, may be so minimal or isolated that it is "virtually impossible to conclude that they could have affected the results of the election." *Super Thrift Markets*, 233 NLRB 409 (1977); *Clark Equipment Co*., 278 NLRB 498, 505 (1986).

In *Diamond Walnut Growers, Inc*. 326 NLRB 28 (1998), the issue on remand from the Court of Appeals for the District of Columbia was whether the Board should set aside an election which the union had lost. In that case, shortly after the direction of second election, the petitioning union requested that the respondent reinstate several strikers. The Board found that the reinstatement of three striking employees to work that differed from their pre-strike job categories was discriminatory and in violation of Section 8(a)(3). It also set aside the second election and directed a third election based upon the unlawful job assignments.

In the D.C. Circuit's en banc decision, a majority affirmed the Board's findings and enforced its Order only with respect to one striking employee. The court remanded the case for the Board to determine whether there was still a basis for setting aside the election.

The respondent in *Diamond Walnut Growers* argued that only one violation was found to have occurred during the pre-election period, and that given its nature, the *Dal-Tex* exception should be extended to the alleged 8(a)(3) violation therein. Two members of the Board rejected the respondent's arguments. In particular, Member Fox noted that the discriminatory job assignment at issue occurred throughout the two-week period immediately preceding the election. Moreover, the discrimination was "notorious, manifest to all employees in one of the Respondent's most populous departments." As the Board concluded, "[u]nder these circumstances, the relationship between [the employee's] job assignment and the election was obvious to all employees, since [the employee] has returned to work for the express purpose of campaigning for the election." 326 NLRB at 29. It was additionally noted that the discrimination occurred proximate to the election, increasing the likelihood that it had an impact on the employees' choice. Under these circumstances, a Board majority concluded that it was not a case where it was "virtually impossible" to conclude that the discriminatory job assignment could have adversely affected the election results.[19] Member Hurtgen, dissenting, argued that the two-Member majority applied what was an essentially per se rule and argued that each case must be evaluated on its own facts to determine whether the conduct was such to preclude a fair election.[20]

In *Crown Bolt, Inc*., 343 NLRB No. 86, slip op. at 4 (2004), a case involving concurrent objections and allegations of unfair labor practices, the Board prospectively overruled all prior decisions in which the Board had presumed dissemination of plant closure threats or other kinds of coercive statements, to the extent that those decisions relied on such presumptions. Of particular significance to the instant case, the Board reaffirmed that in objections cases, the "general rule [is] that the burden of proof should rest on the party who 'seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion.' " Id. at 2 (citing John William Strong, ed., McCormick on Evidence Sec. 337 (4th ed. 1992)). As the Board stated, because "[t]here is a strong presumption that ballots case under specific NLRB procedural safeguards reflect the true desires of employees, . . .the burden of proof on parties seeking to have a Board-supervised election set aside is a 'heavy one.' " *Crown Bolt*, supra, slip op. at 2 (internal citations omitted).

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[19] Member Gould wrote separately to set forth his view to emphasize his view that the Regional Director's refusal to conduct a mail ballot election provided an even more substantial basis for setting aside the election.

[20] In *Safeway, Inc*., 338 NLRB 525, 526, fn.3 (2002), two former members of the Board indicated their disagreement with the "virtually impossible" standard. Notably, *Safeway* did not itself involve a situation where there were concurrent alleged unfair labor practices, where the "virtually impossible" would apply. Nevertheless, Members Cowen and Bartlett, (citing Member Hurtgen's dissent in *Diamond Walnut Growers*) wrote:

> Although we recognize that the "virtually impossible" standard is not applicable in the instant circumstance and that there is not a three-Member majority to overrule it, we note that we do not agree with that standard. Rather, in our view, each case must be evaluated on its particular facts to determine whether, under all of the circumstances, the conduct was such to preclude fair election

Since that time Chairman Battista and Member Shaumber have indicated that this issue continues to be under consideration. See *Metaldyne Corp*. 339 NLRB 352 fn. 4 (2003); *Ogihara America Corporation*, 343 NLRB No. 91 slip op. at 2, fn. 1 (2004). Nevertheless, it does not appear that this standard has been expressly overruled.

While noting that threats of plant closure is a "very severe threat and highly coercive of employees' rights," the Board nevertheless held that the severity of the threat should not shift away from the objecting party the burden to prove dissemination and the extent thereof. Id. slip op. at 4.

In *Bon Appetit Management Co*., 334 NLRB 1042, 1044 (2001), the Board described the test for determining whether conduct, otherwise violative of the Act, is de minimis or of a nature sufficient to warrant the setting aside of an election: "In determining whether misconduct could have affected the results of the election, the Board has considered the number of violations, their severity, the extent of dissemination and the size of the unit. . . . Other factors the Board considers include the 'closeness of the election, proximity of the conduct to the election date [and the] number of unit employees affected. ' " (citations omitted).

Under ordinary circumstances, the discharge of a known and outspoken union supporter in the penultimate moment prior to a union election, in a relatively small unit of employees, would be considered to be conduct which would tend to interfere with employees' free exercise of choice in an election. The instant case, however, presents certain unique circumstances. As noted above, Davis' absence from the workplace was not sudden and obvious, but rather began a full six months prior to the election and as a result of his physician's determination that he should take medical leave. The date of his projected return to work was postponed several times as a consequence of continued medical evaluations, which did not involve any employer action or inaction. There is no evidence that he was present at the Respondent's facility during this period of time. To the extent that the record contains any evidence of employee awareness of Davis' situation, it establishes only that employees were unaware of when he was scheduled to return to work, as he failed to do so on a number of occasions. There is no evidence that Davis engaged in any campaigning during the pre-election period. Significantly, the record fails to establish that other employees had knowledge of what transpired on June 27, or generally that Davis had attempted to return to work and been refused employment. Thus, there is no direct evidence of dissemination of Respondent's unlawful conduct by the time employees cast their vote on the following day.

Given the Board's admonition in *Crown Bolt*, supra, I am not certain whether it would be appropriate for me to presume dissemination under any circumstance. Under the particular facts presented by the record in this case, I find that there is insufficient evidence, either direct or circumstantial, to support such a presumption here. Inasmuch as I cannot find that other unit employees knew that Davis had been unlawfully terminated, there is no basis for me to conclude that Respondent's unfair labor practices could reasonably have tended to affect the outcome of the election. Cf. *Diamond Walnut Growers*, supra, where the Board relied specifically upon the "notorious" dissemination of the respondent's unlawful conduct in deciding to overturn the election. Similarly, in *Ogihara America Corporation*, supra, the Board found that the respondent therein violated Section 8(a)(1) and (3) of the Act and engaged in objectionable conduct where issued a warning to a known union adherent for distributing union literature, which was found to be protected conduct. The respondent therein argued that the conduct was de minimus. In rejecting that argument, the administrative law judge noted that "[n]umerous employees, 13 of whom are identified by name in the record became aware that [the alleged discriminatee] had been disciplined for distributing union literature. Employees discussed the discipline at breaks, and employees who worked on a second shift heard of the discipline when they reported to work." 343 NLRB No. 91, slip op at 8. Such evidence is lacking in the instant case. Therefore, based upon the foregoing, I find that the General Counsel has failed to meet its

overall burden of adducing evidence sufficient to warrant the setting aside of the election herein. *Crown Bolt*, supra.[21]

Conclusions of Law

1. The Respondent, Safety Kleen Systems, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Local 641, International Brotherhood of Teamsters, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Joseph Davis, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

4. The Respondent has not violated the Act in any other manner alleged in the complaint

5. The Respondent has not committed objectionable conduct as alleged in the Report on Objections.

Remedy[22]

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

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[21] Moreover, while not dispositive of the issues herein, I note that the Union did not appear at the hearing to present evidence or argue in favor of the objection. This unexplained failure, at the very least, leads me to question the Union's interest in proceeding to another election or in representing the employees in the unit, as well as whether conducting a third election would be an efficacious use of the Board's resources in furtherance of the Section 7 rights of employees.

[22] During the hearing, Respondent extended an offer of reinstatement to Davis. In her brief, Counsel for the General Counsel contends that the offer was not made in good faith and was made under circumstances making it untenable. Thus, Counsel for the General urges that I find that it is "impermissibly tainted." A copy of the reinstatement offer was not placed into evidence herein, and no testimony was adduced from Davis on this issue. While there was some discussion on the record regarding the reinstatement offer, including the positions of the parties with regard to whether it was sufficient, I find that the issue was not fully litigated and the record is inadequate for me to reach a determination on this matter. I conclude, therefore, that a determination of whether the offer advanced to Davis satisfies Respondent's obligation to offer him reinstatement and to toll backpay should be litigated and determined, if necessary, at the compliance stage.

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

Continued

ORDER

The Respondent, Safety Kleen Systems, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Local 641, International Brotherhood of Teamsters, AFL-CIO, or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Joseph Davis full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Joseph Davis whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Joseph Davis in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in South Plainfield, New Jersey copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 27, 2005.

adopted by the Board and all objections to them shall be deemed waived for all purposes.

[24] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER RECOMMENDED that the objection filed in Case No. 22-RC-12532 be overruled and that a Certification of Results be issued.

Dated, Washington, D.C., April 13, 2006.

_____
Mindy E. Landow
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 641, International Brotherhood of Teamsters, AFL-CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Joseph Davis full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Joseph Davis whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Joseph Davis and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

SAFETY KLEEN SYSTEMS, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

20 Washington Place, 5th Floor

Newark, New Jersey 07102-3110

Hours: 8:30 a.m. to 5 p.m.

973-645-2100.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784.